Case Nos. 82-6203

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

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ALEX WAKEMAN, WALTER TEN FINGERS, Appellants,

v.

STATE OF SOUTH DAKOTA, Appellee.

* * * *

On Appeal from the

Supreme Court of South Dakota

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JOINT JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY APPEAL

I. Is the state open fire statute invalid as repugnant to the First Amendment to the United States Constitution where the statute as applied by the Appellee State of South Dakota prohibited Lakota Indian Appellants from using traditional open pit ceremonial fires for Lakota religious purposes?

II. Is the prohibition by the state open fire statute as applied by the Appellee State of South Dakota of Lakota Indian Appellants' use of traditional open pit ceremonial fires for Lakota religious purposes preempted by the 1868 Ft. Laramie Treaty, 15 Stat. 635, and therefore invalid as repugnant to said Treaty and Article VI, Clause 2, of the United States Constitution?

III. Is the prohibition by the state open fire statute as applied by the Appellee State of South Dakota of Lakota Indian Appellants' use of traditional open pit ceremonial fires for Lakota religious purposes preempted by the fire regulations of the United States Forest Service, 36 C.F.R. Part 261, and therefore invalid as repugnant to said Federal regulations and Article VI, Clause 2, of the United States Constitution?

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REPORTS OF OPINIONS BELOW

The official report of the opinion of the Supreme Court of South Dakota in this matter below is South Dakota v. Dewey Brave Heart, et al., Nos. 13656 and 13655, 326 N.W.2d 220 (1982).

The opinion of the trial court in this matter below is found in thr trial transcripts of South Dakota v. Walter Ten Fingers and South Dakota v. Alex Wakeman, Seventh Judicial Circuit, Custer County, South Dakota, dated December 18, 1981.

JURISDICTIONAL GROUNDS

This proceeding is a direct appeal from a decision of the Supreme Court of South Dakota entered on November 10, 1982. The Notice of Appeal herein was filed on February 8, 1983, with the Clerk of the Supreme Court of South Dakota and with the Clerk of the Circuit Court of the Seventh Jucidial Circuit, Custer County, South Dakota. Jurisdiction of this appeal is conferred upon the United States Supreme Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS INVOLVED

The following Constitutional provisions, treaties, statutes, and regulations are involved in this appeal. Their pertinent text, because of thier length, are set forth in the Appendix.

United States Constitution, Article VI, Clause 2
(The Supremacy Clause)

United States Constitution, First Amendment

15 Stat. 635, Act of April 29, 1868
(The Fort Laramie Treaty of 1868)

19 Stat. 254, Act of 1877

16 U.S.C. §551

S.D.C.L. §34-35-16

S.D.C.L. §34-35-17

36 C.F.R. Part 261

STATEMENT OF THE CASE

Appellants are members of the Lakota Tribe of Indians (otherwise known as the Oglala Sioux Tribe) from the Pine Ridge Indian Reservation in South Dakota. Each Appellant practices the "Lakota tradition", a religious way of life, which includes the development of a spiritual understanding and relationship with Tunkashila Wakan-Tanka (the Great Spirit, the Creator) through the practice of various ceremonies centered around the Sacred Pipe. A sacred, "natural", fire is an essential, integral, part of each ceremony. Appellants purify themselves in the sweat lodge ceremony through prayer and steam produced by white hot stones which have been heated in an open pit fire. In the Sacred Pipe ceremony, Appellants sit and pray with other participants around a sacred, natural, open pit fire (which represents the center of the Lakota universe) from which a coal is taken to light the Sacred Pipe used in the ceremony. According to Lakota tradition, a separate, natural, open pit fire is used to prepare the food offered to the Lakota ancestral spirits and eaten in the traditional celebration or religious "feast" which follows each Pipe ceremony.

In early November, 1981, under the vision and guidance of a nationally and tribally recognized Lakota religious advisor, Appellants with other traditional Lakota persons established a spiritual encampment (known hereinafter as the "Camp") on land possessed and controlled by the United States Forest Service and within the boundaries of the Black Hills National Forest, the 1868 Ft. Laramie Treaty, 15 Stat. 635, and the State of South Dakota. The Camp was organized, erected, and conducted according to the strict requirements of Lakota tradition and included daily use of open pit fires by Camp members for sweat lodge ceremonies, Sacred Pipe ceremonies, and religious feasts. The fires, being sacred to Camp members, were constantly —

monitored, well-tended, and all in pits with flamable material removed. None of the fires had escaped any of the pits or posed any danger to the forest. During the period of the encampment, the United States Forest Service conducted an occasionally unmonitored "controlled burn" of the forest in the immediate vicinity of the Camp.

On several occasions prior to November 15, 1981, the Camp was visited by federal and/or state law enforcement authorities and Camp members were told to apply for a permit for open fires. On November 12, 1981, a Camp representative applied in person to the United States Forest Service District Ranger for a permit to build fires to be used "...in the practice of the Lakota Religion." The District Ranger, acting under state law, SDCL Chapter 34-35, pursuant to to a Cooperative Fire Control Agreement between the Black Hills National Forest Supervisor and the South Dakota Director of Forestry, denied the permit request citing as his reasons the "current weather conditions" and the vagueness of the request. He made no attempt with the Camp representative to obtain more information, clarify the request, mention any lawful alternatives to open fires, or consider issuing the permit with appropriate conditions.

On November 15, 1981, various state and county law enforcement authorities raided the Camp, arrested everyone present, including Appellants, for violations of the South Dakota open fire statute, SDCL §34-35-16, and dismantled and removed everything at the Camp.

At the pretrial motions hearing, Appellants and the other defendants moved to dismiss the charges on the ground that the United States Forest Service fire regulations, 36 C.F.R. Part 261, preempted state enforcement of the state open fire statute in this situation. The trial court denied the motion without

comment. Appellants and the other defendants then moved at the close of their defense to dismiss the charges on the grounds that the state open fire statute as applied was invalid as repugnant to the protection of the free exercise of their religion found in the First Amendment to the United States Constition and to the rights guaranteed to them by the 1868 Ft. Laramie Treaty, supra. In ruling upon these motions, the trial court specifically found that there was "...no doubt in [its] mind, that this particular Camp, this location, was a non-violent, peaceful Camp [of] spiritual significance to the participants." However, the trial court, believing that it lacked subject matter jurisdiction, refused to rule on the First Amendment issue by reasoning that the issue had to be raised through an appeal in federal court by Appellants and the other defendants. The court further refused to hear the treaty issue, again believing that it lacked subject matter jurisdiction by reason of the pending Court of Claims appeal of United States v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed. 2d 844 (1980).

On December 10, 1981, the trial court entered judgment against each of the defendants including Appellants, finding them guilty of the misdemeanor of open fire and fined each the amount of $50.00.

The judgments were appealed to the Supreme Court of South Dakota on December 24, 1981. Each of the aforesaid issues were again raised before that Court. On November 10, 1982, the South Dakota Supreme Court ruled: that the state open fire statute was not preempted by federal law because any conflicts were resolved by another Forest Service regulation, 36 C.F.R. §211.3 and by the aforementioned Cooperative Fire Control Agreement; that subject matter jurisdiction to hear Indian treaty arguments of any kind lay solely with the United States Court of Claims; and that,

although it was proven that "...a purpose of the Camp was to attain spiritual growth and fulfillment", the Appellants and the other defendants had failed to meet their initial burder of showing the enforcement of the statute "in fact" denied them free exercise of their religion because they had not made any showing that their traditional Lakota religious ceremonies could not have been performed through the use of any other alternative. Brave Heart v. South Dakota, S.D., 326 N.W.2d 220 (1982).

STATEMENT OF REASONS FOR PLENARY CONSIDERATION

First Amendment Issue

The above-mentioned decision by the South Dakota Supreme Court is in direct opposition to the only other known decision regarding the First Amendment protection of Indian religious ceremonies from prohibition by a general state permitting statute. See, Frank v. State, Alaska, 604 P.2d 1068 (1979). It is believed to be a matter of first impression for the United States Supreme Court. In Frank, the Alaska Supreme Court found the state's moose hunting statute invalid as applied to the traditional hunting and use of moose meat in the religious feast following potlach (burial) ceremonies by Alaskan Indians as repugnant to the protection of the free exercise of religion found in the First Amendment of the United States Constitution. A decision upon this question would have an obvious impact upon hundreds of tribes and thousands of Indian persons across the Nation who still practice traditional religious ceremonies in places and ways the states believe they have jurisdiction. In recent years there was been a well-known and great revival among Indian people of interest and belief in their culture and traditions. The importance to the United States of protecting and guaranteeing the integrity of religious practices and traditions of Indian people, its first residents, was strongly

affirmed by Congress with the passage of the Indian Religious Freedom Act, 42 U.S.C. §1996. However, the Act failed to provide adequate remedies or mechanisms for the enforcement of the Congressional declarations, and Indian plaintiffs have repeatedly failed to obtain the protection of their religious practices and traditions thereunder. Appellants believe that the First Amendment provides the protection of the religious practices so integrally a part of the lives of traditional Indian persons.

Furthermore, the South Dakota Supreme Court's opinion raises another serious question which affects all future First Amendment claimants. The Court ruled that in order to meet their initial First Amendment burden -- proving that the state statute operated or was exercised as a "coercive effect" on the practice of their religion, Abington Sch. Dist. v. Shempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844, 858 (1963) -- the Appellants were required to prove only that the statute as actually enforced infringed upon their traditional religious ceremonies, but additionally that there existed no other lawful alternative methods to perform the ceremonies. Or, in other words, as long as any alternatives existed at all, there could be no coercion of First Amendment rights. This showing is a great expansion of the previously defined initial burden on a First Amendment claimant. This expansive interpretation of the initial burden has been specifically rejected by the Alaska Supreme Court in the Frank case when it rejected the State's argument that the Indian defendant had to prove that deer could not have been substituted for moose in the potlach feast. The Fourth Circuit has similarly rejected this expansion of the burden in Edwards v. Maryland State Fair & Agr. Soc., 628 F.2d 282, 286 (4th Cir. 1980) in holding that religious activity could not be abridged on the rationale that it could be exercised

in some alternative lawful place. (Citing, Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939), which involved freedom of speech). The South Dakota Supreme Court decision, if allowed to remain, will establish a clear precedent for all future First Amendment questions in South Dakota and potentially for other jurisdictions as well, seriously affecting the First Amendment rights not only of Indian persons, but the rights of all persons in the United States.

Treaty Issue

The South Dakota Supreme Court's ruling that it lacked subject matter jurisdiction to decide whether or not the 1868 Ft. Laramie Treaty, supra, preempted the state open fire statute was certainly wrong. It clearly confused the exclusive jurisdiction of the United States Court of Claims over monetary claims by Indian people for loss of treaty rights with the jurisdiction to decide whether rights still possessed by Indian persons under treaty are protected from infringement by the state pursuant to state statute. Both federal and state courts have repeatedly assumed jurisdiction over the latter circumstance. See, Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 705, 20 L.Ed.2d 697 (1968); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); and Antoine v. Washington, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). The effect of the South Dakota Supreme Court's decision is to deprive all Indian persons of any redress for the protection of their federally guaranteed treaty rights when such rights become an issue in any court in South Dakota. The decision is clearly at odds with the previously cited United States Supreme Court opinions and should be overturned by this Court in the

interest of justice.

Whether or not the 1868 Ft. Laramie Treaty preempts the state open fire statute must initially turn upon whether Appellants have retained any residual rights under that treaty to the free exercise of their religion within the boundaries of the Treaty. The United States attempted to abrogate much of the Treaty with the Act of 1877, 19 Stat. 254. See, United States v. Sioux Nations of Indians, supra. However, Appellants firmly believe that they are still possessed minimally of certain residual rights, including the free exercise of their religion, because there was not express abrogation of those rights by the Act of 1877 which only, at most, took the property rights to own and possess the Black Hills of South Dakota. The question of whether inherent Indian treaty rights can survive general federal abrogation of a treaty has already been decided affirmatively by this Court in Menominee Tribe v. United States, supra. However, the Menominee Tribe case involved the right to hunt on former treaty lands free of state general hunting regulations, while the case at bar raises for the first time whether religious rights are treaty protected rights like those to hunt and fish which survive unless expressly abrogated by Congress.

The importance of this question is obviously substantial for the hundreds of thousands of Indian persons in the United States. It is particularly so for the many traditional Indian persons who have found it difficult to freely exercise their religious beliefs without state interference or who have, as mentioned previously, been unable to gain the protection of their religious practices and traditions intended by Congress with the Indian Religious Freedom Act, supra. The denial of these freedoms to Indian persons not only denigrates the strength

and integrity of our Constitution and treaties, but also continues the 400-year-old process of cultural genocide which our nation has overtly and, at times, covertly practiced upon our first inhabitants through the imposition of non-Indian values, ways, and world-views upon them. The United States Supreme Court has on many occasions come to the aid of our nation's oppressed minorities, rightfully recognizing that the affirmance and guarantee of their rights under our Constitution is an affirmation and guarantee of the rights of all citizens. It is in this spirit that the Appellants request a full review and reversal of the lower court's decision.

Preemption by Forest Service Regulations

The South Dakota Supreme Court's decision on the third issue -- that the state open fire statute was not preempted by conflicting federal regulations -- flies in the face of the long established principle that a state statute is void to the extent that it actually conflicts with a valid federal law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158, 98 S.Ct. 988, 55 L.Ed. 2d 179 (1978); also, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 613, 99 S.Ct. 1905, 60 L.Ed.2d 508, 520 (1979). The Court did not deny that conflicts existed between the state open fire statute and the federal fire regulations to the extent that the District Ranger might have been able to issue the permit had he applied the federal regulation to the situation. Instead, the Court reasoned that another federal regulation, 36 C.F.R. §211.3, and a Cooperative Fire Control Agreement entered into by a low-level Forest Service official, resolved any and all such conflicts by authorizing the District Ranger to enforce the state statute and ignore the conflicts created by the federal regulations, 36 C.F.R. Part 261. However, the Court was over zealous in its affirmance of the validity of the state law because a review of §211.3 reveals no authorization for the

enforcement of a conflicting state law and a review of the Forest Service regulations reveals no authorization for a low-level Forest Service official to enter into any agreements with the state to substitute conflicting state law for the federal regulation.

This issue, therefore, presents not only the usual but obviously substantial Supremacy Clause and state's rights questions, but also raises more specific questions surrounding the resolution of conflict between state and federal law. By nature, these questions not only affect the activities of citizens who are regulated by such laws, but are additionally important to all government officials and agencies which are commonly confronted with such conflicts in the fulfillment of their public responsibilities. If the decision is allowed to stand, the previously mentioned long established principle regarding the Supremacy Clause will not remain so settled and the role and authority of both the Constitution and federal officials will be seriously undermined in South Dakota and elsewhere. Unless reversed, the decision raises doubts whether citizens can or should rely on federal law where there is a conflict with state requirements. However, if such persons do not rely on conflicting federal law, they place themselves in jeopardy as well for violations of such laws, and, as in the case of Appellants, are left with the sole alternative of not exercising their First Amendment religious freedom at all.

For the above-stated reasons, Appellants urge this Court to accept this appeal for plenary consideration with full briefing and argument.

Respectfully submitted,

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